No. 15-8764

IN THE
SUPREME COURT OF THE UNITED STATES

PABLO LUCIO VASQUEZ,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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This is a capital case.

QUESTION PRESENTED

Petitioner Pablo Lucio Vasquez is scheduled to be executed after 6:00 p.m. on Wednesday, April 6, 2016, for the brutal robbery and murder of 12-year-old David Cardenas. Vasquez previously and unsuccessfully challenged the constitutionality of his state court capital murder conviction and death sentence in both state and federal courts. A few months prior to his scheduled execution date, Vasquez filed a subsequent habeas application in state court alleging that his rights under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), had been violated by the trial court's repeated excusal of potential jurors with biases against the death penalty. Without considering the merits of the claim, the state court dismissed the application as an abuse of the writ because it did not meet any of the exceptions that might allow consideration of claims raised in a subsequent habeas application. It is this determination that Vasquez now appeals in his request for certiorari, which raises the following question:

> Should the Court grant certiorari to review the state court's dismissal, on an independent state procedural ground, of Vasquez's *Witherspoon* allegation to determine whether the holdings of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), should be extended to encompass such claims as well as claims asserting the ineffective assistance of direct appeal counsel?

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REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." An example of such a "compelling reason" would be if a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, or if a state court has decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10 (West 2015). Vasquez advances no such special or important reason in this case, and none exist.

In state court, Vasquez was cited for abuse of the writ because his most recent subsequent writ did not meet the requirements of Texas Code of Criminal Procedure Article 11.071, Section 5(a). The state court's disposition alone, which relied upon an adequate and independent state procedural ground, forecloses certiorari review. *Walker v. Martin*, 562 U.S. 307, 315-16 (2011). Vasquez does not challenge the state court's application of state procedural rules or its decision to dismiss his petition as an abuse of the writ. Instead, he appears to argue that the underlying allegation—that the trial court erroneously excused prospective jurors in violation of his constitutional rights—should be excused from the procedural default doctrine pursuant to

this Court's holdings in *Martinez* and *Trevino*. Aside from the fact that Vasquez's claim has not been raised in federal court and thus is not yet subject to the procedural default doctrine, there are several reasons why this Court should decline to review his petition.

To start, this Court has determined that the equitable exception to procedural default found in *Martinez* and *Trevino* applies only to claims asserting the ineffective assistance of trial counsel (IATC). Vasquez make no attempt to argue otherwise; rather, he simply states that the rationale of these holdings "are directly applicable." Pet. 23. He also simultaneously argues that *Martinez* and *Trevino* should encompass claims concerning direct appeal counsel, despite the fact that he vehemently denies that such a claim is being raised here. *Id.* at 21, 24. Yet Vasquez has provided no reason why the Court should expand the limited equitable holding of *Martinez* to encompass either *Witherspoon* claims or claims concerning the alleged ineffectiveness of direct appeal counsel.

Furthermore, even if the *Martinez* equitable exception were to apply generally to these types of claims, it would not apply in this case. Vasquez Vasquez fails to show that the *Witherspoon* claim, aside from its procedural posture, has any merit whatsoever, much less that his direct appeal counsel could be faulted for not raising it during the direct appeal proceedings. For

these reasons, Vasquez fails to present any compelling reason for this Court's review, and his petition and request for stay should be denied.

STATEMENT OF JURISDICTION

The Court does not have jurisdiction because the state court's dismissal of Vasquez's subsequent habeas application rested on an adequate and independent state procedural bar. *Walker*, 562 U.S. at 315-16; *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Appeals for the Fifth Circuit adequately summarized the facts of the offense in its unpublished opinion from 2015 denying Vasquez a COA:

> Vasquez was convicted of the murder of 12-year-old David Cardenas on the night of April 17-18, 1998, in Donna, Texas. An anonymous caller notified a police officer that Cardenas had been slain during a party that Vasquez attended. When Cardenas's body was found, he was missing one of his arms and part of the other, had no skin on his back, and had a hole in the back of his head. An autopsy concluded that the cause of death was a major fracture in the back of Cardenas's skull caused by blunt force. The body was also mutilated after death by a means that caused bones to shatter.
>
> After recovering Cardenas's body, police detained Vasquez. He admitted to hitting Cardenas in the head with a pipe and cutting his throat. He also stated that he and an accomplice dragged Cardenas's body to a field for burial. Fearing that Cardenas was still alive, one of the perpetrators hit Cardenas in

> the face with a shovel. Vasquez also took a gold ring and chain from the body. Cardenas's sister confirmed that her brother had been wearing a gold ring and chain that night. Additionally, Vasquez's cousin testified that Vasquez told her he had killed the boy because Cardenas did not "give him what he wanted."

Vasquez v. Stephens, 597 Fed. Appx. 775 (5th Cir. 2015).

II. Relevant Procedural History

In December 1998, Vasquez was convicted and sentenced to death for the brutal capital murder of David Cardenas. CR 2 (Indictment), CR 405-406 (Judgment).[1] His conviction and sentence were affirmed on direct appeal in April 2002. *Vasquez v. State*, No. 73,456 (Tex. Crim. App. 2002). During the pendency of his direct appeal, Vasquez filed a state application for writ of habeas corpus in the trial court. SHCR-01 at 52-120.[2] Based on the trial court's findings of fact and conclusions of law recommending that relief be denied as well as its own review of the record, the Texas Court of Criminal Appeals (TCCA) ultimately denied relief. *Id.* at 411-550, cover. Vasquez then sought federal habeas corpus relief; however, the district court granted Vasquez's motion to dismiss without prejudice to allow him to return to state

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1 "CR" refers to the Clerk's Record, and is followed by the relevant page number. "RR" refers to the state record of transcribed trial proceedings, and is preceded by volume number and followed by page numbers.

2 "SHCR-01" refers to the state habeas Clerk's Record—the transcript of pleadings and documents filed with the court during Vasquez's first state habeas proceeding—and is followed by the relevant page numbers.

court to present several unexhausted claims to the state court first. *See Vasquez v. Johnson*, No. 02-MC-27 (S.D. Tex. 2002).

Shortly thereafter, Vasquez filed a successive habeas application in the state court raising thirteen new claims not previously brought in his first state habeas petition, including claims of intellectual disability and mental illness. I SHCR-02, at 52-87.[3] The TCCA dismissed all of the claims as an abuse of the writ, except for Vasquez's allegation that he is intellectually disabled. *Per Curiam* Order dated May 7, 2003. Concerning the intellectual disability allegation, the court adopted the trial court's recommendation that the claim be denied on the merits. I SHCR-02 at cover; III SHCR-02 at 697-773.

In April 2004, Vasquez returned to federal court and filed an amended petition for federal habeas corpus relief raising a total of thirteen claims for relief, two of which were later abandoned.[4] *Vasquez v. Stephens*, No. 7:04-cv-

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3 "SHCR-02" refers to the state habeas Clerk's Record—the transcript of pleadings and documents filed with the court during Vasquez's second state habeas proceeding—and is also preceded by volume number and followed by page numbers.

4 Along with his amended petition, Vasquez filed a motion for the appointment of experts to help him further develop his claim of intellectual disability. DE 1, 4. The Court granted this request and authorized Dr. Roger Dean Saunders to evaluate Vasquez, who later submitted a report stating that, in his professional opinion, "Vasquez is not, and has never been, an individual with [intellectual disability]." DE 18, 22, 23. Vasquez subsequently abandoned his first and fourth grounds for relief regarding his intellectual disability and insanity. DE 24.

143 (S.D. Tex.), Docket Entry (DE) 1, 9, 24. The Director responded by demonstrating that each of the remaining claims raised in Vasquez's petition lacked merit, and that all but three of the allegations were procedurally barred from federal habeas relief. DE 32. After considering the pleadings and arguments of both parties, a Report and Recommendation was issued by the Magistrate Judge in December 2005 recommending that relief should be denied. DE 39.

Several years after this Report and Recommendation issued, this Court issued its opinion in *Martinez* creating for the first time a limited exception to the procedural default of IATC claims. The Court's later decision in *Trevino* found that this limited equitable exception generally applies to Texas capital cases. In light of these decisions, the district court instructed the parties to file supplemental briefing regarding the impact of *Martinez* and *Trevino* on the Magistrate's Report and Recommendation. DE 43, 44. Following this additional briefing, the Magistrate Judge issued a Supplemental Report and Recommendation finding that *Martinez* and *Trevino* do not apply to the instant case, and again recommended that the IATC claims be dismissed as procedurally barred and alternatively on their merits. DE 47.

The district court adopted the Magistrate's Supplemental Report and Recommendation and granted the Director's motion for summary judgment in

March 2014. DE 49, 50. Vasquez appealed the district court's decision to the Fifth Circuit, which affirmed the judgment in an unpublished opinion dated January 23, 2015. *Vasquez*, 597 Fed. Appx. 775, *cert. denied*, 136 S. Ct. 36 (Oct. 5, 2015). Two months after this Court denied certiorari, the trial court scheduled Vasquez to be executed on April 6, 2016.

On January 21, 2016, Vasquez filed a subsequent application for state habeas relief in the trial court raising the *Witherspoon* allegation at issue here. A month later, the TCCA dismissed the application as an abuse of the writ, and denied Vasquez's motion to stay the execution. *Ex parte Vasquez*, No. 50,801-03, *Per curiam* Order dated February 24, 2016. On March 16, 2016, Vasquez filed a second petition for federal habeas corpus relief in the federal district court raising an allegation that he is mentally ill and his execution should thus be prohibited. *Vasquez*, No. 7:16-cv-115, DE 1. The district court denied Vasquez's petition and request for stay of execution on March 29, 2016. DE 12. Now, over a month after the TCCA dismissed his subsequent application as an abuse of the writ, Vasquez is appealing the state court's decision.

ARGUMENT

In his subsequent state habeas application, Vasquez argued that the trial court's repeated excusal of prospective jurors with sympathies against the death penalty violated his rights under *Witherspoon*.[5] As discussed previously, the state court dismissed Vasquez's subsequent application as an abuse of the writ without considering the merits of the claim. This disposition in and of itself forecloses certiorari review. *Walker*, 562 U.S. at 315-16. Ignoring this fact, Vasquez appeals the state court's decision arguing that the equitable principles set forth by this Court in *Martinez* and *Trevino* should prevent his *Witherspoon* claim from being subjected to the procedural default doctrine. Although Vasquez is getting ahead of himself—his claim has not yet been procedurally defaulted because he has not attempted to raise it in federal court—he is correct that relief would be precluded by the procedural default doctrine if he were to raise it in another federal petition. He is mistaken, however, to imply that *Martinez* and *Trevino* are somehow applicable to either

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5 Vasquez raised an almost identical claim in his petition for federal habeas relief filed almost twelve years ago. *Vasquez*, No. 7:04-cv-143, DE 1 at 37-41. The only difference is that Vasquez's prior claim was within the context of an IATC claim—i.e., failure to object to the trial court's excusal of the jurors—and not the straight up *Witherspoon* claim that he now asserts. *Id.* Vasquez's IATC claim was dismissed by the district court as procedurally defaulted and alternatively without merit, DE 47, and was eventually the subject of Vasquez's petition for certiorari which was also denied by this Court in October 2015. *Vasquez v. Stephens*, 136 S. Ct. 36.

Witherspoon claims or allegations that direct appeal counsel was ineffective for not raising such a claim during direct appeal proceedings. Thus, no compelling reason exists for this Court to review the claim.

I. Certiorari review is foreclosed by an independent and adequate state-procedural bar, and the underlying allegation would be subject to the procedural default doctrine if presented in a federal habeas petition.

Review of Vasquez's allegation is unequivocally foreclosed because the state court's disposition of the claims relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute. *See*, *e.g.*, *Moore v. Texas*, 122 S. Ct. 2350, 2352-53 (2002) (Scalia, J., dissenting); *Emery v. Johnson*, 139 F.3d 191, 195-96 (5th Cir. 1997). This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Long*, 463 U.S. at 1042. Indeed, Vasquez fails to present any justification for not applying the Court's long-standing rule against reviewing claims denied by

state courts on state-law grounds, and none exists.[6] Thus, there is no jurisdictional basis for granting certiorari review.

Vasquez admits that his *Witherspoon* claim, independent of any allegations concerning his trial counsel, was raised for the first time in his most recent (third) state habeas application which was dismissed pursuant to an independent state procedural bar. Pet. 20 (stating that the issue was not raised on direct appeal or in either of the earlier writ applications). Specifically, the TCCA dismissed the claims as an abuse of the writ because they did not meet any of the exceptions that might allow consideration of claims raised in a subsequent habeas application under Article 11.071, § 5. *Ex parte Vasquez*, No. 50,801-03, *Per curiam* Order dated February 24, 2016. As a result, Vasquez would also be procedurally barred from receiving federal habeas relief on this claim if he were to raise it in federal court.

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6 Although this is not a federal habeas proceeding in which the Court actually retains jurisdiction to review procedurally defaulted claims, *see Lambrix v. Singletary*, 520 U.S. 518, 523 (1997), Vasquez nonetheless cannot demonstrate cause that might excuse such a default. In the "cause" inquiry, the core issue is whether the legal or factual basis of the underlying claim were "reasonably available" to him at the time he filed his previous state habeas application. *See Reed v. Ross*, 468 U.S. 1, 16 (1984). But as Vasquez concedes in his petition for certiorari, the basis of his *Witherspoon* claim has been available since 1976, a year before Vasquez was even born. Pet. 22. Consequently, no cause could be shown for his failure to raise this claim earlier.

Supreme Court precedent dictates that procedural default of a petitioner's federal habeas claim occurs where the last state court to consider a claim "clearly and expressly" dismisses it based upon a state procedural rule that provides an adequate basis for denial of relief, independent of the merits. *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012); *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011); *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). The "independent" and "adequate" requirements are satisfied where the court clearly indicates that its dismissal of a particular claim rests upon a state ground that bars relief, and that bar is strictly and regularly followed by the state courts.[7] *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001). The rule is not independent when it "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman*, 501 U.S. at 735 (quoting *Long*, 463 U.S. at 1040-41). This doctrine ensures that federal courts give proper respect to state procedural rules. *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51); *see also Edwards v. Carpenter*, 529 U.S. 446, 551 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and

7 The application of an independent and adequate state procedural bar must be honored even if the state court has, in the alternative, reached the merits of the claim. *Harris v. Reed*, 489 U.S. 264, n.10 (1989).

federalism").

In this case, the TCCA delivered a plain statement of its reliance on state procedural rules when it dismissed Vasquez's application "as an abuse of the writ without considering the merits of the claim" because Vasquez failed to meet the dictates of Article 11.071, § 5. *Per curiam* Order dated February 24, 2016. Because the Texas court strictly and regularly applies its abuse-of-the-writ statute, the dismissal of a habeas petition upon such grounds constitutes an independent and adequate state procedural bar. *Rocha v. Thaler*, 626 F.3d 815, 830 (5th Cir. 2010); *Hughes v. Quarterman,* 530 F.3d 336, 342 (5th Cir. 2008); *Aguilar v. Dretke*, 428 F.3d 526, 533 (5th Cir. 2005) ("This court has consistently held that Texas' abuse-of-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling.").

Vasquez is thus precluded from federal habeas relief on the instant claim absent a showing of cause for the default and actual prejudice that is attributable to the default.[8] *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 485 (1986). To establish cause for this hypothetical procedural

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8 Vasquez can also overcome the procedural bar by asserting a miscarriage of justice. *Coleman*, 501 U.S. at 750. He has made no attempt in any court to establish that this exception applies.

default, Vasquez asserts, without explanation, that the rationale of the Court's holdings in *Martinez v. Ryan* and *Trevino v. Thaler* dictate that a "procedural default should not bar a federal habeas court from hearing in the same circumstances a challenge to the erroneous exclusion of prospective jurors by a trial court." Pet. 23-24. In a non-sequitur, he also contends that the holdings of *Martinez* and *Trevino* should be extended to claims alleging ineffective assistance of direct appeal counsel, despite the fact that he directly admits that the issue herein "is not the effectiveness of [his] attorneys, either at trial or on direct appeal." Pet. 21. As discussed in the following sections, he is mistaken on both accounts.

II. Vasquez has provided no reason why the Court should expand the limited holding of *Martinez* to encompass his *Witherspoon* claim or claims concerning direct appeal counsel.

Under *Martinez*, a petitioner is protected from forfeiting an IATC claim if the petitioner's state habeas counsel failed to raise the claim in state court and was ineffective for doing so. 132 S. Ct. at 1320. In both *Martinez* and *Trevino*, the Court was concerned that the "failure [of a federal court] to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-*trial-counsel* claim." *Trevino*, 133 S. Ct. at 1921 (emphasis added).

Despite the Court having created the *Martinez* exception to address that concern and that concern only, Vasquez argues, without explanation, that the rationale of the opinions should also apply to his *Witherspoon* claim as well as claims alleging ineffective assistance of direct appeal counsel. Pet. 20-25. Indeed, his question presented invites the Court to expand its holding in *Martinez* to now include such claims. *Id.* The Court should decline this invitation.

In *Martinez*, the Court found for the first time an equitable exception to the unqualified statement previously asserted in *Coleman v. Thompson*, *supra*, that an error by an attorney in a postconviction proceeding does not qualify as cause to excuse a procedural default. 132 S. Ct. at 1315. The Court's later decision in *Trevino* found that this limited equitable exception generally applies to Texas capital cases. 133 S. Ct. at 1915. Although Vasquez contends that these cases support his argument to extend the *Martinez* exception to other claims, this Court was careful to craft a narrow exception to *Coleman*, limiting its ruling *only* to procedural bars applied to IATC claims. 132 S. Ct. at 1319-21. Specifically, the Court held that the rule in *Coleman* holding that attorney negligence in postconviction proceedings does not establish cause "remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel *at trial*." *Id.* (emphasis added).

As such, it is disingenuous to argue that the decision in *Martinez*, as well as its subsequent application to Texas in *Trevino*, somehow support the expansion of this limited equitable exception to other types of claims.

III. Even assuming that the *Martinez/Trevino* exception encompasses these claims, such an expansion would not be warranted in this case.

To be entitled to the equitable benefits of *Martinez*, Vasquez would still have to demonstrate that his state habeas counsel, by failing to raise the aforementioned claims, was actually ineffective under the *Strickland v. Washington*[9] standard in order to establish cause for his procedural default. *Martinez*, 132 S. Ct. at 1318, 1320. He must then demonstrate that the underlying claims have at least some merit. *Martinez*, 132 S. Ct. at 1318; *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Vasquez has done neither.

A. State habeas counsel was not ineffective.

First, Vasquez fails to demonstrate that his state habeas counsel's representation was ineffective under the *Strickland* standard. The record demonstrates that counsel filed a 40-page petition raising several well-briefed allegations. SHCR-01 at 52-92. Simply because counsel did not raise the specific allegation that Vasquez, in hindsight, now contends he should have raised does not render counsel's assistance ineffective under *Strickland*. 466

9 466 U.S. 668 (1984).

U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way."); *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding appellate counsel is not ineffective merely because he fails to raise issues that his client requests him to raise); *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983) (holding appellate counsel is only constitutionally obligated to raise and brief those issues that are believed to have the best chance of success); *Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("[T]he constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim."). As the record shows that counsel raised and thoroughly briefed several claims, it is clear counsel reviewed the record and "winnowed out" the weaker arguments. *Jones*, 463 U.S. at 751-52. State habeas counsel was therefore was not deficient within the context of *Martinez.*

B. Likewise, direct appeal counsel was not ineffective.

Vasquez's petition is unclear whether it is asserting (a) that the *Martinez* exception should apply to an allegation that direct appeal counsel was ineffective for failing to adequately brief the underlying *Witherspoon* claim and not just to IATC claims, or (b) that the *Martinez* exception should be expanded to encompass attorney error in direct appeal proceedings and not just during postconviction proceedings. *See* Pet. 7, 24. However, in either case Vasquez

cannot demonstrate either deficiency or prejudice under *Strickland* in appellate counsel's failure to raise the *Witherspoon* issue on direct appeal. Accordingly, he would not be entitled to the equitable benefits of *Martinez* even if they were available to him.

It is well settled that a criminal defendant is constitutionally entitled to effective assistance of counsel on direct appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). The familiar standard set out in *Strickland* to prove that counsel afforded unconstitutionally ineffective assistance applies to claims regarding the adequacy of representation by both trial and appellate attorneys. *Id.* Thus, to obtain relief, Vasquez must demonstrate that his appellate counsel's performance was deficient and that such deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687.

It is also well settled that effective assistance of counsel on appeal does not mean that counsel must raise every non-frivolous ground of appeal available. *Jones*, 463 U.S. at 751-54; *Smith*, 528 U.S. at 288; *see also United States v. Williamson*, 183 F.3d 458, 462-63 (5th Cir. 1999). Instead, this Court has acknowledged the importance of allowing appellate attorneys the freedom to select from available issues in order to maximize the likelihood of success on appeal. *Smith*, 528 U.S. at 288. Only "solid, meritorious arguments based on directly controlling precedent should be discovered and

brought to the court's attention." *Williamson*, 183 F.3d at 462-63. Thus, counsel should choose the strongest arguments to present to the appellate court, by "winnow[ing] out weaker arguments and focus[ing] on a few key issues." *Mayo v. Lynaugh*, 882 F.2d 132 (5th Cir. 1989) (quoting *Jones*, 463 U.S. at 751-52). In other words, appellate counsel is only constitutionally obligated to raise and brief those issues that are believed to have the best chance of success. *Jones*, 463 U.S. at 751-53.

For this reason, the Court has recognized that, while it is still possible to raise an ineffective assistance claim based on counsel's failure to raise a particular issue on appeal, it is difficult to demonstrate that counsel was incompetent. *Smith*, 528 U.S. at 288. In order to prove that counsel's failure to raise certain issues constitutes deficient performance and falls "below an objective standard of reasonableness," a petitioner must convince the court that the issues ignored were sufficiently meritorious such that counsel should have asserted them on appeal. *United States v. Phillips*, 210 F.3d 345, 348 (5th Cir. 2000). The Court has also indicated that a petitioner is able to satisfy this first prong of *Strickland* by showing that a particular non-frivolous issue neglected by counsel was "clearly stronger" than those issues actually presented. *Smith*, 528 U.S. at 288.

Here, to prove that his appellate counsel's performance was deficient, Vasquez must demonstrate that the inadequately briefed or ignored points of error were clearly stronger in posture than those counsel took time to brief more thoroughly. Interestingly, Vasquez makes no attempt to assert that the issues he argues counsel should have asserted on direct appeal were "clearly stronger" than the issues actually presented by appellate counsel. Instead, Vasquez relies on the arguments he previously gave in his federal petition in relation to an IATC claim to show that the claim was "sufficiently meritorious" such that appellate counsel should have raised it. *Phillips*, 210 F.3d at 348. But as discussed in section IV below, Vasquez has not sufficiently demonstrated the merit of this claim. As such, he cannot now show that counsel's performance was deficient for not raising them on direct appeal. *See Smith*, *supra*.

C. Vasquez's claim is insubstantial.

Finally, regardless of whether state habeas (or direct appeal) counsel was ineffective, Vasquez still is not entitled to excuse the procedural bar because the underlying defaulted claim is plainly meritless. *Martinez*, 132 S. Ct. at 1318-19. This Court in *Martinez* specifically noted that "[t]o overcome the default, a prisoner must also demonstrate that the underlying [] claim is a substantial one, which is to say that the prisoner must demonstrate that the

claim has some merit." *Id.* at 1318 (citing *Miller-El*, 537 U.S. at 322). When faced with the question of whether there is cause for an apparent default, the Court found that "a State may answer that the claim is insubstantial, *i.e.*, it does not have *any merit* or that it is wholly without factual support, *or* that the attorney in the initial-review collateral proceeding did not perform below constitutional standards." *Id.* at 1319 (emphasis added). As discussed in greater detail below, Vasquez fails to meet this criteria as well. Consequently, Vasquez cannot establish cause that would excuse his unexhausted claims from being procedurally defaulted, thus rendering superfluous the question upon which Vasquez now seeks this Court's review.

IV. Regardless of its procedural posture, Vasquez's underlying *Witherspoon* allegation is wholly without merit.

Citing *Witherspoon*, Vasquez's defaulted allegation asserts that the trial court erroneously excused prospective jurors who had sympathies against the death penalty or judging others, but were "nevertheless qualified to serve as jurors." Pet. 7-20. Vasquez lists twenty-five potential jurors whom he believes were wrongfully excluded from jury service based upon their general objections to the death penalty, and claims that he was denied due process and a fair and impartial jury under the Sixth and Fourteenth Amendments. *Id.* Because none of these jurors were improperly excluded from jury service,

however, Vasquez's allegation would not be entitled to relief even if it were not procedurally barred.

In *Witherspoon*, this Court held that a death sentence cannot be carried out where the jury that imposed that punishment was "chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 46; *Adams v. Texas*, 448 U.S. 38, 46 (1980) (holding that the *Witherspoon* rule is applicable to the bifurcated procedure employed by Texas in capital cases). The Court later set forth the proper standard for determining when a veniremen may be excused for cause because of his/her views in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). There, the Court stated that the critical inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'" *Id.* at 424 (quoting *Adams*, 448 U.S. at 45). A venire member must, therefore, be willing not only to accept that the death penalty is, in certain circumstances, an acceptable punishment, but also to answer the statutory questions without conscious distortion or bias. *Adams*, 448 U.S. at 46.

Vasquez argues the trial court was excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed

concern against judging others. Pet. 7-8. But the record belies this contention, and reveals that each one of the twenty-five prospective jurors were properly excluded in accordance with the *Witt* standard. For example, the following testimony offered by Glenda Lorena Dominguez is typical of the testimony given by each of the twenty-five excluded venire members:

> THE COURT: All right. Ms. Dominguez, I'm going to go straight into the matter of this case. As you well know, this case is a capital murder case and the State is asking for the death penalty. It's a very serious case involving very serious consequences. It is important in a criminal case like this, we have a jury that is willing to keep all the evidence in mind and consider all possible options and that includes the death penalty as a possible sentence, ma'am. Do you understand that?
>
> JUROR: Yes.
>
> THE COURT: All right. And Ms. Dominguez, in looking at your questionnaire and it's right in front of you, ma'am. If you will turn to page 11, Ms. Dominguez, please.
>
> JUROR: (Complied). Uh-huh.
>
> THE COURT: And 59 asks, with respect to capital cases which is this one of them, in which the death penalty could be assessed, which of the following statements best reflects your feelings. And you have marked off that you could never under any circumstances return a verdict that requires assessing a death penalty, ma'am. That's the one you marked off, right?

JUROR: Uh-huh.

THE COURT: And do you feel very strongly about that, Ms. Dominguez?

JUROR: Yes.

THE COURT: And in light of that, Ms. Dominguez, would it make it very difficult for you to be fair in this case though the statement?

JUROR: Probably.

THE COURT: All right. And it probably would, right?

JUROR: Uh-huh.

THE COURT: And it would? Ms. Dominguez, all we ask of prospective juror is to be honest with us.

JUROR: Uh-huh.

THE COURT: If that's the way you feel, there's nothing wrong with that. And we need to know that and because of that, Ms. Dominguez, I'm going to have to excuse you as a juror in this case, ma'am.

JUROR: Okay.

24 RR 5-7. It is evident from this testimony that Ms. Dominguez could never return a verdict requiring the death penalty; thus, in no way could she answer the statutory punishment issues "without conscious distortion or bias." *Adams,* 448 U.S. at 46.

The testimony of Maribel Iris Martinez is also almost identical to the testimony given by each of the twenty-five venire members who were excluded:

THE COURT: All right. Ms. Martinez, back on October 20th I gave the prospective jurors an oath to answer all questions truthfully and the oath still applies this morning, ma'am.

JUROR: Okay.

THE COURT: Ms. Martinez, we looked at the questionnaire just a while ago, or actually since Friday, and since this is a case that involves the possible imposition of the death penalty, I understand that you have very strong feelings against the death penalty, ma'am. Is that correct?

JUROR: That's correct.

THE COURT: And, according to the questionnaire, you're also a Catholic? Is that correct, ma'am?

JUROR: That's correct.

THE COURT: All right. And I also understand, being a Catholic also, the Church has a very strong stance against the capital punishment?

JUROR: That's correct.

THE COURT: And do you also follow that position, Ms. Martinez?

JUROR: Yes.

THE COURT: All right. Let me ask you, ma'am, is [sic] your feelings against the death penalty so strong that it would keep you from being a fair juror in this case involving the possible death penalty as punishment, ma'am?

JUROR: Yes.

THE COURT: All right. And would this be a very bad case for you to be called in as a prospective juror?

JUROR: Yes.

THE COURT: Okay. Ms. Martinez, that being the case, as you well know, we can only have a jury that's willing to keep the - - the death penalty as an option, depending on the evidence. And, since you're not able to do that, we cannot accept you as a juror, ma'am. Do you understand that?

JUROR: I understand.

26 RR 4-6. Again, it is evident from this testimony that Ms. Martinez could not accept the death penalty as an "acceptable punishment", much less answer the statutory punishment issues "without conscious distortion or bias." *Adams*, 448 U.S. at 46.

Each of the twenty-five jurors similarly indicated that, regardless what the facts revealed at trial, they would not be willing to consider the death penalty as a possible punishment. *See* Pet. 8-9 (listing the twenty-five jurors of whom Vasquez complains). Such a position represents more than a general objection to capital punishment. In their juror questionnaires, the jurors listed that they could never "under any circumstances" render a verdict requiring the death penalty, and their strong objections to capital punishment were confirmed by the trial court prior to being dismissed. Such an

unwillingness to consider the death penalty as a possible punishment cannot be considered anything other than a "substantial impairment," and as a result the jurors were properly excluded due to their bias or prejudice against the death penalty. Tex. Code Crim. Proc. art. 35.16(b); *Witt*, 469 U.S. at 424. As the court of appeals below noted in denying Vasquez a COA on the related IATC claim, the trial court "did not merely dismiss the jurors for their views about capital punishment; he dismissed them because they were not willing to impose the death penalty and could not analyze the case without distortion or bias." *Vasquez v. Stephens*, 597 Fed. Appx. at 779.

Consequently, Vasquez's allegation is both procedurally defaulted and rendered without merit due to Vasquez's inability to establish that any of the potential jurors named were improperly excluded from jury service. There is therefore no compelling reason for this Court to now review the claim.

V. Vasquez is not entitled to a stay of execution.

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id. (citing Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). It is well-established that petitioners on death row must show a "reasonable probability" that the underlying issue

is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id.* In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id.* at 893.

Here, Vasquez fails to advance any valid claim for relief. Therefore, a stay of execution is unwarranted, and his request should be denied. The State acknowledges that the harm to Vasquez would be irreparable should the Court refuse to grant the stay. But there is simply no reasonable probability that the Court will grant Vasquez's petition for certiorari. Thus, the State's strong interest in the timely enforcement of a sentence is therefore not outweighed by the unlikely possibility that Vasquez's petition for certiorari will be granted. Vasquez's assertions reveal his claim to be nothing more than a meritless attempt to postpone his execution.

CONCLUSION

For the foregoing reasons, Vasquez has presented no compelling reason to warrant this Court's review. As such, his petition for writ of certiorari should be denied. Additionally, Vasquez does not demonstrate that reasonable jurists would debate these issues or that a court could resolve them in a different manner. Thus, he is not entitled to a stay of execution.

Respectfully submitted,

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